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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TORY EMEAL STONE,

Defendant and Appellant.

H045462

(Santa Clara County
Super. Ct. No. C1652325)

Appellant Tory Emeal Stone pleaded no contest to a variety of drugs- and weapons-related charges after officers found approximately eight grams of cocaine on his person and recovered a loaded handgun from the floorboard of the vehicle in which Stone was a passenger. Stone also admitted allegations that he was personally armed with a firearm in the commission of the drug offenses and that he had served a prior prison term. Stone was sentenced to a total term of six years in state prison.

On appeal, Stone argues the trial court erred in failing to stay sentences on several of the counts under Penal Code section 654.¹ The Attorney General concedes that multiple punishment in this situation was improper, and we find the concession appropriate. We will modify the judgment accordingly and affirm the modified judgment.

¹ Unspecified statutory references are to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND²

Shortly after 11:00 p.m. on November 29, 2016, Santa Clara County sheriff deputies were following up on a case when a white Toyota sedan drove past them. The deputies observed the driver look over at them before accelerating away. Deputies began to pursue the sedan, which unsuccessfully tried to evade them. The vehicle eventually stopped. Deputies saw that, in addition to the driver, someone was lying down in the fully-reclined front passenger seat, apparently trying to hide. The passenger, who was later identified as Stone, got out of the vehicle when directed to do so by the deputies.

The deputies took Stone into custody and, upon searching him, discovered two plastic baggies of cocaine, a digital scale, and \$1,174 in cash. Stone also was in possession of two Visa cards, neither of which belonged to him.

As a deputy approached the vehicle, he saw a handgun in plain view on the passenger side floorboard. The firearm was later identified as a Glock semiautomatic with a 33-round magazine.

Stone was charged by information with possession of cocaine for sale (Health & Saf. Code, § 11351; count 1), transportation of cocaine for sale (Health & Saf. Code, § 11352, subd. (a); count 2), possession of cocaine while armed with a loaded firearm (Health & Saf. Code, § 11370.1; count 3), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 4), possession of ammunition by a felon (§ 30305, subd. (a)(1); count 5), carrying a concealed firearm in a vehicle (§ 25400, subd. (a)(1); count 6), and two misdemeanor counts of unlawful possession of an access card (§ 484e, subd. (c); counts 7 & 8). The information further alleged that Stone was personally armed with a

² Because Stone pleaded no contest to the charges, we derive the facts from the probation report, the testimony offered at the preliminary hearing, and other documents in the record on appeal.

firearm in the commission of counts 1 and 2 (§ 12022, subd. (c)), and that he had served a prior prison term (§ 667.5, subd. (b)).³

Stone pleaded no contest to all counts and admitted each allegation. There was no plea agreement with the district attorney, but the trial court gave a nonbinding indicated sentence of seven years at the September 11, 2017 plea hearing.

At the January 5, 2018 sentencing hearing, the trial court imposed the lesser term of three years on count 2 (transportation for sale), with the three-year firearm enhancement under section 12022, subdivision (c), for a total term of six years. The trial court imposed concurrent sentences on all other counts and struck the prison prior allegation (§ 667.5, subd. (b)) as well as the three-year firearm enhancement (§ 12022, subd. (c)) attached to count 1.⁴ Stone was awarded a total of 81 days of credits, consisting of 41 days of custody credits plus 40 days of conduct credits under section 4019. He was further ordered to pay various fines and fees, none of which are at issue in this appeal.

Stone timely appealed.

II. DISCUSSION

Stone argues that, because he was sentenced to a three-year term for transportation of cocaine for sale and to a three-year enhancement for being personally armed with a firearm while possessing cocaine, the trial court erred in not staying the sentences on the remaining drug and firearm charges (counts 1, 3, 4, 5 & 6) under section 654.

³ The information also alleged that Stone had three prior convictions for possession for sale of a controlled substance (former Health & Saf. Code, § 11370.2, subd. (a)) but those allegations were dismissed at his January 5, 2018 sentencing hearing. The statute was amended effective January 1, 2018 (Stats. 2017, ch. 677, § 1, p. 5031) and Stone's prior convictions no longer fell within its terms.

⁴ On counts 7 and 8, the trial court imposed a six-month term in county jail, concurrent to Stone's prison term. Stone does not challenge this aspect of his sentence.

The Attorney General concedes that the sentences on each of these counts should have been stayed and we agree that the concession is appropriate.

Section 654, subdivision (a) provides, in pertinent part, “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Section 654 is intended “to insure that a defendant’s punishment [is] commensurate with his [or her] culpability.” (*People v. Perez* (1979) 23 Cal.3d 545, 552.) The statute bars multiple punishment for both a single act that violates more than one criminal statute and multiple acts, where those acts comprise an indivisible course of conduct incident to a single criminal objective and intent. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Section 654 is applicable to substantive offenses as well as enhancements. (*People v. Buchanan* (2016) 248 Cal.App.4th 603, 615-617 (*Buchanan*).)

If section 654 applies, the proper procedure is to “stay the sentence on the lesser offense[] while permitting execution of the greater offense consistent with the intent of the sentencing court.” (*People v. Thompson* (1989) 209 Cal.App.3d 1075, 1080.) Courts have held that the preferred remedy when section 654 has been violated and the maximum legal sentence has already been imposed by the trial court is to stay execution of the penalty on the lesser offense rather than remand for resentencing. (*People v. Burns* (1984) 158 Cal.App.3d 1178, 1184.)

As to Stone’s convictions for possession and transportation of cocaine for sale (counts 1 & 2), a defendant who is found in possession of a controlled substance cannot be separately punished “for the same act of transporting for sale the controlled substance and possessing it for sale.” (*Buchanan, supra*, 248 Cal.App.4th at p. 613.) At the time of his arrest, Stone possessed approximately eight grams of cocaine, along with a digital scale and a large amount of cash. Accordingly, upon imposing a sentence on the charge

of transportation of cocaine for sale, the trial court should have stayed Stone's sentence for possessing that same cocaine for sale pursuant to section 654.

Likewise, Stone's convictions on the various firearm-related counts (counts 3, 4, 5 & 6) arose out of his possession of a loaded firearm on the occasion of his arrest for possessing and transporting cocaine for sale. "[A] single possession or carrying of a single firearm on a single occasion may be punished only once under section 654." (*People v. Jones* (2012) 54 Cal.4th 350, 357.) Imposing multiple punishment for unlawful possession of a firearm and unlawful possession of ammunition is also prohibited under section 654 where "all of the ammunition is loaded into the firearm." (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.) Because the enhancement under section 12022, subdivision (c) for being armed with a firearm during the commission of a drug offense carries the longest potential sentence, the sentences on the remaining firearm counts must be stayed. (*Buchanan, supra*, 248 Cal.App.4th at p. 618.)

III. DISPOSITION

The judgment is modified to reflect that the sentences for Stone's convictions for possession of cocaine for sale (count 1), possession of a controlled substance while armed (count 3), possession of a firearm by a felon (count 4), possession of ammunition by a felon (count 5), and carrying a concealed firearm in a vehicle (count 6) are stayed pursuant to Penal Code section 654. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a certified copy of an amended abstract of judgment reflecting this modification.

As modified, the judgment is affirmed.

Premo, J.

WE CONCUR:

Greenwood, P.J.

Elia, J.